SUPREME COURT OF THE UNITED STATES

OCTORER TERM, 1951

No. 151

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellants,

vs.

GREAT NORTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

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ANTHONY KANE,
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Counsel for Appellee.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

Civil No. 3586

GREAT NORTHERN RAILWAY COMPANY, A CORPORATION,

Petitioner-Appellee,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, VALIER COMMUNITY CLUB, A VOLUNTARY CIVIC ORGANIZATION, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, AND MONTANA WESTERN RAILWAY COMPANY,

Defendants-Appellants

MOTION TO AFFIRM

Appellee, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the judgment and decree of the District Court be affirmed.

Statement

This is a direct appeal from the final judgment entered herein March 27, 1951,[1] by a district court of three judges,

[1] The Court's *per curiam* opinion filed March 16, 1951, is reported at 96 F. Supp. 298. Findings of fact and conclusions of law were filed March 27, 1951, and are reproduced as Appendix A to this Motion.

specially constituted pursuant to Title 28 U. S. Code Sections 2284 and 2325. The judgment sets aside and permanently enjoins the enforcement of an order of the Interstate Commerce Commission. The appeal of the defendants United States of America and Interstate Commerce Commission was allowed on May 23, 1951, and appeal papers were served May 25, 1951. The appeal of the remaining defendants was allowed on May 25, 1951, and appeal papers served May 29, 1951.

The order so set aside is dated July 31, 1950, and, as subsequently modified, required the establishment not later than April 1, 1951, of (1) joint through freight rates on grain from points on the line of the Montana Western Railway Company to points on the line of the Great Northern Railway Company and (2) certain prescribed divisions of such rates. It directed no change in the through charges shippers must pay. The practical result would have been a reapportionment of the through revenues from grain moving at the existing rate level which would sharply increase the share of the Montana Western at the expense of the Great Northern.

The Commission proceeding culminating in the order was its docket 30325 entitled *Valier Community Club* v. *Montana Western Railway Company and Great Northern Railway Company*, initiated by a "voluntary civic organization". The order in said docket 30325 was also contemporaneously entered in another proceeding to which the Great Northern was not a party, commenced prior to docket 30325 but which the Commission ordered consolidated therewith for further hearing and disposition. That proceeding was finance docket 16515, *Montana Western Railway Company Abandonment*. The order in the consolidated proceedings not only prescribed the joint rates and divisions hereinbefore mentioned but denied the application in Finance Docket

16515, made by the Montana Western for permission to abandon its entire railroad. Accompanying the consolidated order was a report of the Commission, 275 I.C.C. 512, reconsideration of which has been denied. The suit in the District Court in the instant case was to set aside the order insofar as it prescribed the joint rates and divisions which were involved in said docket 30325. The final judgment and decree appealed from operate upon the Commission's order only to the extent it purports to fix such joint rates and divisions.

Undisputed Facts

The Montana Western is a short line independently owned and controlled extending 20 miles between Valier, Montana, a station only on the Montana Western, and Conrad, Montana, a station on both the Montana Western and Great Northern. (See map attached to this motion, Appendix C.)

As the District Court's opinion indicates in some detail (96 F. Supp. at pp. 299-300), Valier has a population of 800, Conrad a population of 2000, the railroad reaches two other points having a population of 10 and 11 respectively, and serves an area of about 553 square miles with a total population of about 2000. The Montana Western's bonded indebtedness is $165,000, all owed to the Great Northern, which bears interest from January 1, 1912, no part of which has been paid. Montana Western's total indebtedness to the Great Northern as of July, 1949, was over $700,000. The Great Northern has paid its operating deficits since 1924 and these have averaged over $18,000 a year for the period from 1933 to 1948 and are becoming progressively larger. At the end of 1948, the Great Northern declined to make further advances. The condition of the Montana Western's operating properties, which is rapidly deteriorating, and the progressive inroads of motor trucks upon

its traffic are fully described in the Court's opinion (96 F. Supp. 300).

About 90 per cent of the Montana Western's traffic is outbound grain to interstate destinations, mostly to Minneapolis and Duluth, Minnesota. It also handles some mustard seed and a small amount of other traffic. Its present proportional rates on outbound grain are 9 cents[2] from Valier to Conrad, 20 miles, and 8.5 cents from Williams to Conrad, 14 miles. The Great Northern's proportional rate from Conrad to Minneapolis, Minnesota, which is a typical destination on the Great Northern, is 62.5 cents for 1030 miles, making a total of 71.5 cents from Valier and 71 cents from Williams. The Great Northern's proportional rates from Conrad to certain other points are set forth in the Court's findings (Appendix A, Finding VI). In Finding VI, the Court states in part:

> "Under the present basis of proportional rates the Montana Western, which performs 1.9 percent of the 1050-mile haul from Valier to Minneapolis, for example, receives 12.6 percent of the through charges. Under the joint rates and divisions prescribed in said report and order in Docket 30325 the share of Montana

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[2] Rates are stated in cents per cwt. unless otherwise indicated. The present separately published rates are proportional rates. "Proportional rates are separately established rates applicable to through transportation being separate parts of through rates." *Port Beaumont, Tex.* v. *Agwilines, Inc.*, 243 I.C.C. 679, 683. A joint through rate is a rate published as a unit to apply from a point on one line to a point on another under proper concurrence or agreement of all transportation lines over which the rate applies. *Canton R. Co.* v. *Ann Arbo R. Co.*, 163 I.C.C. 263, 265; *L. & N. R. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 233.

In the instant case the individually established proportional rates of the Montana Western to Conrad which apply only on traffic destined beyond are somewhat lower than the local rates of the Montana Western applying on traffic terminating at Conrad, and likewise the Great Northern's proportional rates from Conrad applying on traffic coming from beyond are lower than its local rates applying on traffic originating at Conrad.

Western would be increased from 9 cents per cwt. to 16.5 cents, the percentage of 12.6 being increased to 23 percent. The Great Northern, which furnishes all the box cars and grain doors to the Montana Western necessary to originate the grain traffic and which performs on its own line, without extra charge, in connection with grain movements to all terminals, the switching and terminal services included in stops for transit and inspection which are availed of as an incident to the transportation and marketing of grain, would, under said report and order, have its compensation for 98.1 percent of the haul (1030 miles) from Valier to Minneapolis reduced from 87.4 percent to 77 percent of the through revenue.

"Considering all grain and mustard seed handled by the Montana Western during the period from January 1, 1946, to September 30, 1949, the Montana Western under its present proportional rates has received 12.8 percent of the total through revenue for an average of 1.9% of the total haul and the Great Northern 87.2 percent of the total through revenue for an average of 98.1 percent of the total haul. Under the joint rates and divisions ordered by the Commission by said report and order the revenue accruing to the Montana Western would be increased to from 22 to 29 percent of the through charges on grain movements from Valier and Williams to Minneapolis, Minnesota, and Spokane and Seattle, Washington, and the Great Northern's revenue decreased to from 71 percent to 78 percent of said through charges."

Commission's Dual Order Prescribing (A) Joint Through Rates and (B) Divisions Could Only Be Tested by Applying Separate Statutory Standards in Respect of Each Portion Thereof.

The order in Docket 30325 requires (1) joint through rates for the interstate transportation of grain from points on the Montana Western to points on the Great Northern in

amounts not exceeding the present through charges at the combination or aggregate of the separately established rates of the Montana Western to Conrad and of the Great Northern from Conrad, and (2) divisions of such prescribed joint rates which will increase the Montana Western's share of the through revenues by what the Commission estimates at $58,000. The establishment of the joint through rates ordered will not affect in any way the charges which shippers must pay but by prescribing joint rates and ordering divisions thereof different from the proportions which the present individual rates are of the through charges, the Commission has sought to require an increase, at the Great Northern's expense, of the Montana Western's share of the through revenues by almost 100 percent. (Finding VI). The Montana Western did not ask for this additional revenue but on the contrary petitioned for abandonment of its line in Finance Docket 16515.

The Commission did not find the existing combination rates from Montana Western to Great Northern points, considered as through charges, unreasonable or unlawful, and its prescription of joint through rates in the same amount as the existing combinations was, of course, an affirmation of the lawfulness of the existing through charges. Neither did the Commission find the existing separately established rates entering into the present through combination rates unreasonable or unlawful as individual proportional rates. It did find that the new joint through rates it ordered were "necessary and desirable in the public interest" (275 I.C.C. at page 526), though admittedly they would effect no change in charges to the shipping public. It also found that the "increased revenues for the Montana Western under the divisions" of such joint through rates which it undertook to fix were "needed to insure safe and efficient operation of that carrier's line and

to pay interest on its indebtedness to the Great Northern." (275 I.C.C. at page 525.)

The statutes setting up procedures for the establishment of joint through rates are different from those governing the fixation of divisions and the issues in a rate case are essentialy different from those in a divisions case.

Two statutes authorize establishment of joint through rates. Section 15(1) of the Interstate Commerce Act[3] permits the Commission to prescribe joint rates to take the place of joint rates found unreasonable or otherwise unlawful and makes a Commission finding of unreasonableness or unlawfulness in the existing rate a prerequisite to any Commission order prescribing a new one. Obviously, the Commission did not proceed under that section. Section 15 (3) as limited by Section 15 (4)[4] permits the Commission upon a finding, after hearing, that joint through rates are necessary or desirable in the public interest to prescribe such rates where no joint through rates existed previously but not for the purpose of assisting a carrier that would participate therein to meet its financial needs. This is the section under which the order prescribing joint rates was attempted to be made.

Said Section 15 (3) further states that the Commission may prescribe divisions of joint rates but only "as hereinafter provided." The quoted phrase clearly refers to Section 15 (6),[4] which follows after Section 15 (3) and which sets up the procedure for fixing divisions and permits the Commission to establish such divisions only after taking into consideration certain things, including, among others, the financial needs of the participating carriers.

Obviously Sections 15 (3), 15 (4) and 15 (6) contemplate that joint rates and divisions thereof, the establishment of

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[3] 49 U. S. Code, Section 15 (1), set forth in Appendix B.

[4] See Appendix B.

which are governed by completely different criteria, shall not be determined upon at the same time, in the same proceeding, upon consideration of the same evidence.

The Supreme Court has held that in a proceeding brought before the Commission involving a joint rate, "the division of the joint rate among the participating carriers is a matter which in no way concerns the shipper" whose "only interest is that the charge shall be reasonable as a whole." *L. & N. Rr.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 234.

On the other hand, in a case brought for the prescription of divisions the Supreme Court has held that "the Commission * * * is not required or authorized to investigate or determine whether the joint rates are reasonable * * *. The question whether it [the Commission] complied with the requirements of the Act does not depend upon the level of the rates or the amounts of revenue to be divided. The purpose of the provisions [relating to divisions] * * * is to empower and require the Commission to make divisions that colloquially may be said to be fair." *R. & O. Rr.* v. *United States*, 298 U.S. 349, 357.

In *Canton Rr. Co.* v. *Ann Arbor Rr. Co.*, 163 I.C.C. 263, at page 265, the Commission said with reference to the statute providing for the fixation of divisions, Section 15 (6),

> "It is plain * * * that there must exist joint rates * * * as a prerequisite to the exercise of our authority to fix divisions * * *."

At the outset of the instant proceeding before the Commission the Great Northern moved to dismiss the divisions phase of the case until it was first determined whether or not joint rates should be established; in other words, until the event should occur upon which would depend the jurisdiction to determine divisions. The motion was denied. The result was a hearing and a determination of the joint

rate issue or consideration of voluminous evidence showing the financial needs of the Montana Western, a matter pertinent only in the divisions case and forbidden to be considered in the joint rate case. The Commission obviously gave controlling weight to the financial needs of the Montana Western in determining whether or not to order joint rates, for the rates ordered resulted in no change in charges to shippers and no reason, except the laying of a foundation for the fixation of divisions according the Montana Western more money, is assigned for requiring the Great Northern to become a participant in joint rates and so a joint participant with this insolvent in a transportation service beyond its undertaking. See *L. & N. Rr. Co.* v. *Sloss-Sheffield Co.*; 269 U.S. 217; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U.S. 585.

In appellants' Statement as to Jurisdiction the dual aspect of the Commission's order in this proceeding is obscured in the very first sentence of the discussion under the heading "The Questions are Substantial". The appellants there say "the basic issue * * * is whether the Commission, in prescribing the joint rate *and the division*, went beyond its powers when it gave weight to the financial needs of one of the carriers involved" (emphasis ours), and then cite two decisions having nothing to do with joint rates and which merely support the view that the financial needs of cariers may be considered *in a divisions case*. Both decisions antedate the amendment to Section 15 (4), which prohibits the establishment of joint through rates to assist a carrier in meeting its financial needs.

The distinction between (a) what the Commission is required to consider in a joint through rate case and what it is forbidden to consider in such a case and (b) what the Commission is required to consider in a divisions case, when there occurs that event upon which an issue as to

divisions can be made, must be kept clear if the order in the instant case is to be adequately tested by the separate standards established by the Act for each type of proceedings. As we presently show, the District Court entertained no doubt as to that distinction, applied these separate standards correctly, and reached the only result possible when it set aside the Commission's order.

The Court's Opinion, Finding and Judgment.

The order was attacked in Court on several grounds. We mention here only those to which the Court attached controlling significance.

The first ground of attack rested upon the fact that since the order prescribing joint rates was obviously not made under Section 15 (1) (because the Commission had made no finding condemning existing rates as unreasonable or otherwise unlawful), since the Commission's order could not have been lawfully made under Section 15 (3) as limited by Section 15(4) (because its purpose was to assist the Montana Western in meeting its financial needs), and since there is no other statute authorizing the prescription of joint through rates, the conclusion was inescapable that the order exceeded the Commission's statutory powers. The District Court so found. It stated that the order was "but a means to the end of assisting the Montana Western to meet obvious financial needs," and it added

> "This is expressly prohibited by law." (96 F. Supp. 300)

Another ground was that the Commission exceeded its statutory powers in making an order the effect of which was to require a change in existing proportions of through revenues at their present level without any finding either under the statutes relating to rates or relating to divisions that such proportions—whether regarded as individual

rates or as divisions—were unreasonable or otherwise unlawful. It was pointed out that the Interstate Commerce Act required findings showing a violation of law from the existing apportionment before a valid order could be entered the effect of which was not to change the through rate level but instead to require money to be taken from one pocket and put into another. Sections 15 (1) and 15 (6). In its opinion the District Court commented (96 F. Supp. 300) upon the fact that the Commission made "no particular point with reference to the reasonableness of the existing rates," that it made "no finding that such rates were unreasonable" or otherwise unlawful (Appendix A, Finding VIII, and then the Court quoted *Beaumont, S. L. & W. Ry Co.* v. *United States,* 282 U.S. 74, 82, where it was said:

> "The Commission may not change an existing division unless it finds that division unjust or unreasonable,"

and cited *B. & O. Rr.* v. *United States, supra,* to the same effect.

Great Northern also contended in court that the order was not sustained by the evidence and was contrary to law. The District Court found that the order was not sustained by the evidence, was contrary to law and resulted in an apportionment of revenues unduly favorable to the Montana Western and clearly unfair to the Great Northern. (96 F. Supp. 300-301; Appendix A, Finding IX).

The Court Correctly Held That the Commission's Order Insofar as It Prescribed Joint Through Rates Was Expressly Prohibited by Section 15 (4).

Appellants urge that the Commission's power to order joint through rates "*and the divisions of such rates*" is delegated to it by Section 15 (3) and that its exercise is

governed by the public interest criterion set forth in Section 15 (3) subject to the limitations in Section 15 (4); that the District Court in the instant case has construed Section 15 (4) as prohibiting the Commission's exercise of its power to order joint through rates "and the divisions of such rates" for the purpose of assisting a carrier financially; and that this construction collides with Section 15 (6) which requires the Commission in fixing divisions to consider the financial needs of the participants in joint rates, conflicts also with *New England Divisions Case*, 261 U.S. 184, and *U.S. v. Abilene & Southern Ry. Co.*, 265 U.S. 274, holding that financial considerations are pertinent in a divisions controversy, and is likewise inconsistent with the National Transportation Policy of "developing, coordinating and preserving a national transportation system." (Statement as to Jurisdiction.)

It is, however, plain that though the Commission's power to order *joint through rates* is granted by Section 15 (3) and governed by the public interest criterion set forth therein subject to the limitations in Section 15 (4), the Commission's authority to prescribe *divisions* of such rates, referred to in Section 15 (3), may be exercised only as provided in Section 15 (6)[5] and that since Section 15 (4) contains not a word about divisions, it cannot be con-

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[5] Section 15 (6) came into the Interstate Commerce Act as part of the Transportation Act of 1920. (41 Stat. pp. 456 *et seq.*) Section 418 of the Transportation Act of 1920 sets forth Sections 15 (3) and 15 (6) as Congress then enacted them. 41 Stat. 485-6. Section 15 (3), as then enacted, authorized the Commission to establish through routes and joint rates where necessary or desirable in the public interest and also provided that the Commission might establish "the divisions of such rates * * * *as hereinafter provided.*" The words "as hereinafter provided" obviously referred to Section 15 (6), likewise contained in Section 418 of the Transportation Act of 1920, which set up the procedure for establishing divisions substantially as it is today.

The words "as hereinafter provided" contained in Section 15 (3) were not altered by subsequent amendments.

strued as limiting in any way the Commission's authority under Section 15 (6) to prescribe division of joint rates upon evidence relating to the financial condition of the participants. So construed, Section 15 (4) does not collide with Section 15 (6) or with the *New England Divisions Case* or with *U.S.* v. *Abilene & Southern R. Co.*, both of which involved not joint rates, but only the prescription of divisions of existing joint rates, and both of which were decided some years before the Transportation Act of 1940, when the language of Section 15 (4) here involved was first incorporated therein.[4] Nor does Section 15 (4), construed in the only manner its plain language requires, collide with the National Transportation Policy. That policy the Commission itself has said "does not confer any authority * * * not specifically conferred in the substantive provisions of the act or modify or change any of its provisions." 273 I.C.C. 337, 367[6]. And the District Court here of course did not construe Section 15 (4) as limiting the Commission's power to prescribe divisions. Rather it said only that the prescription of joint through rates "on the same level as existing lawful combinations," considered together with the new apportionment of revenues ordered thereunder, was "but a means to the end of assisting the Montana Western to meet obvious financial needs," which "is expressly prohibited by law." 96 F. Supp. 300. It was of course crystal clear, even before the Court so stated, that the prescription of joint rates in this case served no direct public purpose. If the language of Section 15 (4) is to be given any effect whatever in any case, it certainly must apply here, to a situation where the joint rates prescribed clearly would serve only as a foundation for compelling a railroad to assume the financial burdens of one of its connections.

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[6] *Cotton From Memphis and Helena to New Orleans*, Citing *Ann Arbor v. United States*, 281 U. S. 658.

Appellants also urge that the language of Section 15 (4) that

> "no through route and joint rates applicable thereto shall be established for the purpose of assisting any carrier that would participate therein to meet its financial needs"

can be construed as denying the Commission's power to prescribe joint through rates only where such prescription would short haul one of the carriers (Statement as to Jurisdiction). Appellants admit, however, that the words quoted "are such that it is possible to give them application to situations which present no short-hauling problem." (Idem.)

The District Court construed the quoted language from Section 15 (4) as not being applicable alone to situations involving short-hauling. It was clearly required so to do.

Section 15 (4) contains three sentences. The first relates to short hauling. The last relates to the establishment of temporary through routes in emergencies. The meaning of the middle sentence, which is simple, plain, and unambiguous and contains no reference to short hauling, is all that is here involved.

Looking at the statute's legislative history, it is noteworthy that prior to 1940 the Commission could not compel a railroad to short haul itself except where existing routes according the carrier its maximum haul were unreasonably long. *United States* v. *Mo. Pac. R. Co.*, 278 U.S. 269. Also prior to 1940, when Section 15 (4) was amended by enactment in its present form, the Commission was dissatisfied with this rigid limitation on its power to require short-hauling (See, for example, its Annual Reports for 1937 and 1938 at pp. 106 and 122, respectively). Nevertheless the Commission then considered that, within the scope of the limited power which it then enjoyed to

require through routes and joint rates, it could determine the necessity for new joint rates by considering the financial needs of the lines who would participate therein. *Fort Smith, S. & R.I.R.R. Co.* v. *A. & V. Ry. Co.*, 107 I.C.C. 523 (decided March 2, 1926) where a dissenting Commissioner criticized this view, saying (p. 526):

> "Robbing Peter to pay Paul has never been held to be either sound finance or compatible with the public interest, * * *."

The 1940 amendment to Section 15 (4) changed that section in several respects. It added after the language prohibiting the short hauling of a railroad (a) unless inclusion of its lines would make the existing through routes unreasonably long, this language:

> "or, (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the pubilc interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. *No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs.*"

It is to be noted that the italicized limitation prohibiting establishment of through routes and joint rates to assist a carrier financially is absolute, while the proviso requiring preference to the originating carrier is subordinated to the public interest and to certain conditions relating to short hauling.

In explaining the 1940 amendment finally agreed upon by the House and Senate, the Conference Report, No. 2832,

76th Congress, 3d Session, to accompany S. 2009, states at pages 70-71:

> "The House amendment made no change in the short-haul provisions of section 15 (4) and the exceptions thereto. The conference substitute in section 10 (b) retains them and includes another exception by providing that the restriction against short hauling a rail carrier shall not apply where the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation. The Commission in the exercise of this additional authority is directed to give reasonable preference in any particular case to the carrier by railroad which originates the traffic, so far as is consistent with the public interest and subject to the limitations with respect to unreasonably long routes and the necessity of providing adequate and more efficient or more economic transportation. *The Commission is prohibited from establishing any through route and joint rates applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs.*" (Italics supplied)

The same explanation was made by Senator Wheeler on the Senate floor (Congressional Record, September 9, 1940, page 17850)[7].

The 1940 amendment to Section 15 (4), the result of a compromise between the House and Senate, permitted the Commission to compel through routes and joint rates in one situation where it could not previously exercise that power—where such through routes and joint rates were found needed to provide adequate, and more efficient or

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[7] The testimony at the hearings before the Congressional subcommittees and the discussion in *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, which construes another part of Section 15 (4), both of which appellants refer to in their Statement as to Jurisdiction, shed no light on the construction of the portion of Section 15 (4) here involved.

more economic transportation. However, the separate mandate prohibiting the Commission from compelling through routes and joint rates for the purpose of assisting a carrier to meet its financial needs, also incorporated in the amendment, but not tied to the first portion of the section relating to short hauling, is conclusive that Congress was also determined to curb the establishment of through routes and joint rates, under Commission order, as such orders had been made in previous cases, for the purpose of "robbing Peter to pay Paul."

While resort to this legislative history is unnecessary in view of the plain language of the law, nevertheless the history, to the extent confirmation may be thought to be needed, confirms the conclusion that Section 15 (4) prohibits, without qualification, the compulsory establishment of through routes and joint rates by the Commission "for the purpose of assisting any carrier * * * to meet its financial needs."

In its report in the instant case the Commission interpreted the language of Section 15 (3), which provides that

> "The Commission may, whenever deemed by it to be necessary or desirable in the public interest, * * * establish through routes * * * and joint rates"

as requiring it to make a specific finding that the joint through rates here ordered were necessary and desirable in the public interest, for it did make a special finding to that effect. 275 I.C.C. 526. The language in Section 15 (4), which limits the Commission's power to establish through routes and joint rates, without qualification, for the purpose of assisting a carrier financially is, however, just as broad and no broader than the language of Section 15 (3) which confers the very power of their establishment upon a finding of public necessity or desirability. (See *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 666.) It would seem

that if the statute imposing the limitation (Section 15 (4)) is inoperative in the instant situation, as appellants argue, then the statute purporting to confer the power to establish the joint through rates is likewise inoperative and has no application here, for there is no dissimilarity in the language of the two subdivisions and the scope of that language must be the same in both cases. Thus, appellants' own logic would seem to lead inevitably to the same conclusion reached by the Court, though for a different reason—that the Commission exceeded its statutory powers.

The District Court was plainly right in adopting the only possible construction of the law—that Section 15 (4) clearly prohibited the ordering of joint through rates in this case, where the purpose thereof was to assist the Montana Western financially.

The Court Correctly Concluded That the Commission Could Not Make an Order the Effect of Which Was to Change the Existing Proportions of Through Revenues under Reasonable Rates, But Not the Measure of the Through Charge, Without a Finding That Such Existing Proportions, Either as Proportional Rates or as Divisions, Were Unreasonable or Unlawful in Some Respect.

The comprehensive Act under which the Commission operates and from which its power is derived requires that when the sole effect of a Commission order is to require a new rate to be charged for the future the existing rate must be found unreasonable or unlawful [8] and that when the sole effect is to require a new division to be observed in the future the existing division must be found unreasonable or unlawful.[9] Appellants have herein stated that the Com-

[8] Section 15 (1); *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, 92; *Chicago, B. & Q. R. Co.* v. *U. S.*, 60 Fed. Supp. 580, 584.

[9] Section 15 (6); *Beaumont, S. L. & W. Ry.* v. *U. S.*, 282 U. S. 74, 82; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 358.

mission's order did not purport to change the through rate level on the traffic involved; that the effect thereof would have been to accord an increased share of the revenue from the through rates to the Montana Western; and that the order would have caused "no possible diversion of traffic" to an alternate route. (Statement as to Jurisdiction.)

Yet no findings were made on the matter upon which the order was designed to operate (the distribution of revenue) either under Section 15 (1), which has to do with rates, or Section 15 (6), which relates to divisions.

The Commission of course could not have made findings of unlawfulness in the existing allocation of revenues under the rate section of the Act, Section 15 (1), because there was no allegation or proof that the existing separate proportional rates were unreasonable or otherwise unlawful. It could not have made findings under the divisions section of the Act, Section 15 (6), because there were no divisions, or any joint rates, in existence upon which its findings could operate. If it had heard the joint rate phase of the litigation first and, if joint rates had been ordered for some valid reason, and then heard a divisions case on an adequate record, it could have made a lawful order as to divisions under Section 15 (6). Instead it sought to operate outside both Sections 15 (1) and 15 (6) by its insistence, over objection, in determining the joint rate and divisions phases of the case simultaneously. The incongruous result is that it has made an order requiring a change in the adjustment of through revenues under lawful through rates upon the sole expedient of public interest, though the public's only interest is in the rate as a whole (*L. & N. Rr.* v. *Sloss-Sheffield Co., supra*), and it has made no finding whatever upon the apportionment of revenues, a matter on which the order operates practically.

The complete and logical statutory scheme developed through the years embodied in the Interstate Commerce Act does not contemplate that there can be lawful action on the part of the Commission, whether resulting upon a consolidation of issues or otherwise, the result of which is to require a redistribution of money collected under lawful rates without a finding under some section of the Act that the existing distribution runs counter to some principle of law.

The District Court commented upon the absence of such findings (96 F. Supp. 300) and cited *Beaumont S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 82, to the effect that

> "The Commission may not change an existing division unless it finds that division unjust or unreasonable."

It also cited *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 358, to the same effect.

It is obvious that the Court was right and that the Commission's order is void for this reason alone.

The Court Correctly Held That the Commission's Order Was Not Sustained by the Evidence and Was Contrary to Law.

We have hereinbefore quoted from Finding VI, which indicates the sharply disproportionate allocation of the through revenues which the Commission ordered, an allocation which is all the more startling when it is considered that the Great Northern, which would, under the order, have its present lawful share thereof diminished, performs without extra charge on its own line all of the expensive accessorial services incident to the marketing and transportation of grain. The record is convincing that this change in the existing apportionment of through revenues

is contrary to the law and completely unsupported by the evidence.

In their Statement as to Jurisdiction appellants state that the Commission, in reaching its conclusion, gave consideration to several matters. It is first suggested that the Commission considered the measure of certain local grain rates for comparable hauls. The Commission did mention such rates but accorded them no controlling weight. In *B. & O. R. Co.* v. *United States*, 298 U. S. 349, at page 357, the Supreme Court said that in a case involving the prescription of divisions

> "The question whether it [the Commission] complied with the requirements of the Act does not depend upon the levels of the rates or the amounts of revenues to be divided."

In this case the measure of Great Northern's local rates for comparable hauls—which, to Minneapolis, for example, were actually 3 cents higher than its existing proportional rates from Conrad—even if the issue before the Commission were solely one of divisions, would not justify any reduction in Great Northern's share of revenues, to say nothing of the drastic reallocation of revenues the Commission ordered.

Appellants also refer to the fact that the Commission also undertook to measure the respective shares of the through revenue of the Montana Western and Great Northern against a formula borrowed from another case involving other commodities in another territory, *Class Rate Investigation*, 1939, 262 I.C.C. 447. The formula was the Appendix-10 scale of class rates set forth at 262 I.C.C. 766. There was, however, no evidence before the Commission that grain generally, or Montana Western grain in particular, moved under conditions even remotely similar to those attending class rated traffic in another part of

the country, and it was shown in the District Court that the Commission had recently undertaken to revise the Appendix-10 scale even as it applied to class rates, because the scale had already become outdated. To the extent that the Commission may have based its decision in the instant proceeding on the assumption that Montana Western grain moves under conditions comparable to class rates (and without such assumption the Commission could not have accorded weight to the Appendix-10 scale), its decision is not only unsupported by the actual evidence in the record, but is based on assumptions entirely outside the record. To that extent appellee was at the very least denied the "'full hearing' set by Congress as a guide to the Commission in the performance of its *quasi-judicial* duties," *Erie R. Co.* v. *U. S.*, 59 F. Supp. 748; *U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 289.

Appellants argue, additionally, that the Commission's order is not against the weight of the evidence because financial considerations are pertinent in a divisions case brought under Section 15 (6) and the financial needs of one of the carriers, the Montana Western, seemed to appellants to require the drastic readjustment ordered. (Statement as to Jurisdiction.) If the proceeding before the Commission had involved only divisions (which was not this case), the financial needs of the Montana Western could then, of course, have been accorded weight but only if there were adequate information in the record to enable consideration by the Commission of the financial needs of the Great Northern as well. Only consideration of the financial needs of both carriers would enable the Commission under Section 15 (6) to determine whether, as the statute provides, the existing proportions "are or will be unjust, unreasonable, inequitable or unduly preferential * * * *as between carriers parties thereto*" and to "pre-

scribe the just, reasonable and equitable divisions thereof to be received by the several carriers," (Emphasis supplied). There was no evidence in the record whatever as to the financial needs of the Great Northern and no evidence from which those needs could even be surmised. The Commission failed to mention such needs in its report and obviously could not have considered them. This alone demonstrates that Section 15 (6) was not followed and vitiates the order as to divisions. *Brimstone R. R. Co.* v. *U. S.*, 276 U. S. 104; *Nevada-California-Oregon Divisions*, 73 I. C. C. 330, 331, where the Commission itself said:

> "Consideration must be given not only to the necessities of the short line but also to the condition and requirements of the connecting lines, having due regard to their revenues, expenses, taxes and return, and considering their operating burdens and the efficiency of their management."[10]

Appellants point to no other evidence as supporting the Commission's order, and there was none.

The readjustment of revenues which the Commission ordered was so manifestly disproportionate to the services performed by the respective carriers and the only evidence which was properly before the Commission was so grossly inadequate to support such a remarkable result that the District Court was compelled to conclude, as it did, that the order was completely insupportable and contrary to law.

Conclusion

Within the limited scope of this motion it has not been possible to discuss all of the points made in the District

[10] This defect in the proof could not be waived for a determination of divisions on financial considerations "without evidence is beyond the power of the Commission." *U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 288.

Court or which might be argued on appeal which show beyond question that the District Court's judgment was the only one which could possibly have been made. We have pointed to a few of the outstanding features of the case which alone clearly demonstrate that the decision is plainly sound and that the appeal presents no substantial questions. It is therefore respectfully submitted that the District Court's judgment should be affirmed.

Dated June 7, 1951.

EDWIN C. MATTHIAS,
ANTHONY KANE,
LOUIS E. TORINUS, JR.,
Attorneys for Petitioner-Appellee,
175 E. Fourth Street,
St. Paul, Minnesota.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

GREAT NORTHERN RAILWAY COMPANY, a Corporation, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Defendant,*

INTERSTATE COMMERCE COMMISSION, VALIER COMMUNITY CLUB, a Voluntary Civic Organization, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, and MONTANA WESTERN RAILWAY COMPANY, *Intervening Defendants*

(Civil No. 3586)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT AND DECREE

The above-entitled matter came duly on for hearing on February 20, 1951, before a duly constituted district court of three judges convoked pursuant to Title 28, U.S. Code, Sections 2284 and 2325. Edwin C. Matthias, Anthony Kane and Louis E. Torinus, Jr., appeared for and in behalf of the petitioner. Donald E. Van Koughnet, Special Assistant to the Attorney General of the United States, H. G. Morison, Assistant Attorney General of the United States, James E. Killday and John F. Baecher, Special Assistants to the Attorney General of the United States, and Clarence U. Landrum, United State Attorney for the District of Minnesota, appeared for and in behalf of the defendant. Daniel W. Knowlton, Chief Counsel for the Interstate Commerce Commission, Edward M. Reidy, Associate Chief Counsel of said Commission, and Charlie H. Johns, Attorney, appeared for and in behalf of the Interstate Commerce Commission, intervening defendant. Edwin S. Booth, Secretary-Counsel of the Board of Railroad Commissioners of the State of Montana, and Lewis E. Popplar, Assistant Attorney General of the State of Montana, appeared for and in behalf of the

Board of Railroad Commissioners of the State of Montana and Valier Community Club, intervening defendants. Art Jardine appeared for and in behalf of Montana Western Railway Company, intervening defendant.

Evidence having been introduced by petitioner and by intervening defendants and received by the Court, the Court having heard the arguments of counsel and having taken the cause under advisement and considered the pleadings, the evidence, the arguments and briefs of counsel and the Court being fully advised in the premises and having filed its opinion herein on March 16, 1951, now makes the following Findings of Fact, Conclusions of Law, and Order for Judgment and Decree.

Findings of Fact

I

This suit has been brought to enjoin, set aside and annul a certain order entered by the Interstate Commerce Commission (hereinafter called the "Commission") in a proceeding entitled "Docket No. 30325, Valier Community Club v. Montana Western Railway Company and Great Northern Railway Company" on July 31, 1950, as modified by subsequent amendments thereto. Said order was simultaneously entered by the Commission in a proceeding entitled "Finance Docket No. 16515, In the Matter of Montana Western Railway Company Abandonment" and embraces issues before the Commission in both said Docket 30325 and Finance Docket 16515. This suit attacks the order only insofar as it affects issues in Docket 30325.

II

Petitioner Great Northern Railway Company, hereinafter referred to as "Great Northern" is a corporation organized and existing under the laws of the State of Minnesota, having its principal office in Minnesota. It operates lines of railroad in the states of Montana, North Dakota, South Dakota, Iowa, Minnesota, Wisconsin, Idaho, Washington, Oregon and California, and is engaged in the transportation of property for hire, both interstate and intrastate. Mon-

tana Western Railway Company, hereinafter referred to as "Montana Western" is a corporation organized and existing under and by virtue of the laws of the State of Montana and operates a short line of railway extending 20 miles between Valier, Montana, a station only on the Montana Western, and Conrad, Montana, which is a station on both the Montana Western and Great Northern and a junction point between said railroads. The Montana Western is engaged in both interstate and intrastate commerce. The principal traffic handled by Montana Western consists of grain originating on its line and transported beyond its line through said junction at Conrad, Montana, to terminals on the Great Northern which are located outside of Montana at Minneapolis, Minnesota, Duluth, Minnesota, Seattle, Washington, and other points. The presently applicable rates for the transportation of grain from points on the Montana Western to points on the Great Northern are combinations of the separately established proportional rates of the Montana Western to Conrad, Montana, and the proportional rates of the Great Northern from Conrad, Montana, to such destinations.

III

On August 1, 1949, the Valier Community Club, a voluntary civic organization of Valier, Montana, filed with the Commission a complaint in said Docket 30325 in which Montana Western and Great Northern were made defendants. In said complaint as later amended Valier Community Club alleged that the combinations of proportional rates applicable to the transportation of grain from points on the Montana Western to points on the Great Northern via Conrad, Montana, should be made joint rates between the Montana Western and the Great Northern and prayed that an order be made creating such joint rates in amounts the equivalent of the presently existing combinations of proportional rates and that said railroads be required to divide the proceeds of said joint rates in such proportion as the Commission should order.

IV

Great Northern and Montana Western duly filed with the Commission their separate written answers to said com-

plaint. On September 19, 1949, Great Northern moved the Commission, in said Docket 30325, for an order requiring complainant to eliminate from the prayer of said complaint the request that the Commission prescribe the divisions to be received by the respective defendants out of any joint rates which might be prescribed as a result of said proceeding, and for certain other relief. Thereafter and on October 13, 1949, upon consideration of said motion the Commission entered an order in both Docket 30325 and Finance Docket 16515, said order reading in part as follows:

> "*It is ordered,* That said motion be, and it is hereby, overruled, without prejudice to the renewal of any portion or the whole thereof at the hearing;
>
> "*It is further ordered,* That Finance Docket No. 16515 be, and it is hereby, reopened for further hearing, and that No. 30325 and Finance Docket No. 16515 be heard or further heard for disposition upon a common record * * *."

At the time said order of October 13, 1949, was made Finance Docket 16515, which consisted of an application by Montana Western to abandon its entire line of railroad, a proceeding to which Great Northern was not a party, had already been heard before an Examiner of the Interstate Commerce Commission and the record for the receipt of testimony therein had already been closed.

V

On December 5th and 6th, 1949, hearing upon the complaint in Docket 30325 and a further hearing in Finance Docket 16515 (reopened) was held at Great Falls, Montana, before the Honorable Myron Witters, an examiner for said Commission. At said hearing Great Northern renewed said motion of September 19, 1949, which was thereupon overruled. At said time Great Northern objected to the consolidation of Finance Docket 16515 (which was replete with evidence of the financial difficulties of the Montana Western) with Docket 30325, for hearing and disposition upon a common record, and said motion was likewise overruled. Evidence was received at said hearing but

participation by Great Northern, both at said hearing and at all stages of the proceedings, was confined to Docket 30325. In due course said Examiner issued a proposed report, exceptions to such proposed report were filed with the Commission, and the Commission heard oral argument in said consolidated proceedings. Thereafter the Commission, on July 31, 1950, entered a report and order in Docket 30325 and in Finance Docket 16515, consolidated. In said report the Commission made the following ultimate findings with respect to the issues in Docket 30325:

> "We * * * find that it is necessary and desirable in the public interest that joint through rates be established for the interstate transportation of grain, in carloads, from points on the Montana Western to points on the Great Northern, and that such rates may not exceed the present combination of proportional rates to and from Conrad.
>
> "We further find that just, reasonable, and equitable divisions of such joint rates are determined by the use as divisional factors of the distance rates set forth in appendix 10 of *Class Rate Investigation. 1939, supra,* [262 I.C.C. 447 at page 766] for the respective hauls of the two roads, provided that the divisional factors thus determined for the Montana Western shall be increased 20 percent, and provided further, that on grain to Minneapolis and Duluth, and points beyond, the divisional factors thus determined for the Great Northern shall be decreased 10 percent. Fractions in percentages shall be dropped when less than 0.5, increased to the next integer when over 0.5, and when equal an additional integer shall be added to the smaller of the percentages; fractions in divisional factors shall be dropped when less than 0.5 and increased to the next integer when 0.5 or over; and fractions in the resulting divisions shall be resolved to the nearest half cent."

(The Commission also found that public convenience and necessity do not permit abandonment of the Montana Western insofar as interstate and foreign commerce is concerned

and that the application in Finance Docket 16515 should be denied.) The portions of the accompanying order, likewise entered at said time in said consolidated proceeding, which are material to Docket 30325 are as follows:

"*It is further ordered,* That the above-named defendants in No. 30325 be, and they are hereby, notified and required to cease and desist, on or before November 16, 1950, and thereafter to abstain, from applying combinations of proportional rates for the interstate transportation of grain, in carloads, from points on the line of the Montana Western Railway Company to points on the line of the Great Northern Railway Company.

"*It is further ordered,* That said defendants, be, and they are hereby, notified and required to establish on or before November 16, 1950, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the interstate transportation of grain, in carloads, from points on the line of The Montana Western Railway Company to points on the line of the Great Northern Railway Company, joint rates which shall not exceed the present combinations of proportional rates to and from Conrad, Montana.

"*It is further ordered,* That the just, reasonable and equitable divisions of the joint rates prescribed in the next preceding paragraph hereof shall be determined by the use as divisional factors of the distance rates set forth in appendix 10 to the report in *Class Rate Investigation, 1939,* 262 I.C.C. 447, at page 766, for the respective hauls of the Montana Western Railway Company and the Great Northern Railway Company; provided (1) that the divisional factors thus determined for the Montana Western Railway Company shall be increased 20 percent; (2) that on grain to Minneapolis and Duluth, Minn., and points beyond, the divisional factors thus determined for the Great Northern Railway Company shall be

decerased 10 per cent; and (3) that fractions shall be resolved as indicated in the report made a part hereof.

"*And it is further ordered,* That this order shall continue in force until the further order of the Commission."

(The order also denied the abandonment application in Finance Docket 16515.) By amendments to said order subsequently entered by the Commission the effective date thereof was from time to time postponed and the period of notice originally provided therein was shortened but otherwise the terms of said order were left unchanged. Said order as presently modified provides that compliance must be accomplished on or before April 1, 1951, on not less than one day's notice (instead of November 16, 1950, on not less than 30 days' notice as originally provided) but otherwise the terms of said order of July 31, 1950, remain in full force and effect.

VI

Valier, Montana, has a population of about 800. There are two non-agency stations on the line of the Montana Western, Manson and Williams, having an estimated population of 10 and 11 respectively. Valier and Williams are grain shipping stations. The approximate area served by Montana Western is about 553 square miles, comprised of a total population of about 2,000. The Montana Western's bonded indebtedness is $165,000, all of which is owed to the Great Northern and bears interest at six percent from January 1, 1912. The principal and interest remain wholly unpaid. It also owes the Great Northern, as of March 31, 1949, $155,829 for materials and supplies, repairs, labor and money advanced to cover operating expenses. The total indebtedness of the Montana Western to the Great Northern, at the time of the first hearing in July, 1949, in Finance Docket 16515 was $737,604. Since 1924, the Montana Western's operating losses have been paid by advances from the Great Northern. These losses averaged over $18,000 a year for the period from 1933 to 1948, inclusive. Its line was not built according to accepted standards of economical maintenance. Untreated cross ties

were laid on the ground with practically no ballast. As a result, drainage is almost nil on the greater portion of the line, and the cross ties deteriorate rapidly. Its rolling stock consists of one gasoline-electric locomotive, one steam locomotive, with three sets of drivers, and one flat-car. There are motortruck and motor bus services daily on Federal Highway No. 91 running north and south through Conrad. An oil-surfaced highway runs between Valier and Highway No. 91. The highway distance between Conrad and Valier is 23 miles. A graveled highway runs southwest from Valier, connecting with U.S. Highway No. 89.— Outbound grain to interstate destinations reached by or via the Great Northern constitutes about 90 percent of the tonnage carried by the Montana Western. Most of the grain moves to Minneapolis and Duluth, Minnesota. Most of the farmers in the area served by the Montana Western ship their cattle by truck either to Great Falls, Montana, or to Shelby. The area served by the line produces from 800,000 to 1,000,000 bushels of grain annually. There is a bulk oil storage plant at Williams, but most of the oil stored in this plant is now brought in by motortruck. The key grade is three percent, and is against the outbound movement, and limits the capacity of the steam locomotive to eight carloads and the gasoline-electric locomotive to two carloads of grain. The rates on grain from points on the line have always been proportional rates based on Conrad and resulted from an agreement made in 1924 after an investigation by the Board of Railroad Commissioners of the State of Montana. Only about five percent of the carload tonnage carried by the Montana Western moves on joint through rates with the Great Northern.

The present proportional rates of the Montana Western on grain are 9 cents from Valier to Conrad,[11] 20 miles, and 8.5 cents from Williams to Conrad, 14 miles. The present proportional rate of the Great Northern from Conrad to Minneapolis in 62.5 cents for 1030 miles, making a total of

[11] Rates are stated in cents per cwt. unless otherwise indicated.

71.5 cents from Valier and 71 cents from Williams. The Great Northern's proportional rate from Conrad to Seattle, Wash., 788 miles, and points taking the same rate, is 58.5 cents, making a combination of 67.5 cents from Valier and 67 cents from Williams. The proportional rate from Conrad to Spokane, Wash., 457 miles, is 56 cents, making a combination of 65 cents from Valier and 64.5 cents from Williams.

Under the present basis of proportional rates the Montana Western, which performs 1.9 percent of the 1050-mile haul from Valier to Minneapolis, for example, receives 12.6 percent of the through charges. Under the joint rates and divisions prescribed in said report and order in Docket 30325 the share of Montana Western would be increased from 9 cents per cwt. to 16.5 cents, the percentage of 12.6 being increased to 23 percent. The Great Northern, which furnishes all the boxcars and grain doors to the Montana Western necessary to originate the grain traffic and which performs on its own line, without extra charge, in connection with grain movements to all terminals, the switching and terminal services included in stops for transit and inspection which are availed of as an incident to the transportation and marketing of grain, would, under said report and order, have its compensation for 98.1 percent of the haul (1030 miles) from Valier to Minneapolis reduced from 87.4 percent to 77 percent of the through revenue.

Considering all grain and mustard seed handled by the Montana Western during the period from January 1, 1946, to September 30, 1949, the Montana Western under its present proportional rates has received 12.8 percent of the total through revenue for an average of 1.9 percent of the total haul and the Great Northern 87.2 percent of the total through revenue for an average of 98.1 percent of the total haul. Under the joint rates and divisions ordered by the

Commission by said report and order the revenue accruing to the Montana Western would be increased to from 22 to 29 percent of the through charges on grain movements from Valier and Williams to Minneapolis, Minnesota, and Spokane and Seattle, Washington, and the Great Northern's revenue decreased to from 71 percent to 78 percent of said through charges.

The establishment of the joint through rates so required by the Commission would not affect in any way the charges which the shippers must pay but by prescribing joint rates and divisions in the amount indicated as aforesaid the Commission seeks to require (by its report and order in Docket 30325) an increase of the Montana Western's share of the through revenues by an annual amount of at least $35,000, which increased revenues for the Montana Western are found by the Commission to be "needed to insure safe and efficient operation of that carrier's line and to pay interest on its indebtedness to the Great Northern."

VII

The aforesaid existing combinations of proportional rates on grain from points on the Montana Western to points on the Great Northern are not found in said report to be unlawful in any respect. The Commission in said order prescribes joint through rates in the same amounts as said existing lawful combinations, to take the place of such combinations, solely as a foundation for fixing divisions which will allow Montana Western a substantially increased proportion of the through revenue for the purpose of assisting that carrier in meeting its financial needs.

VIII

The order in Docket 30325 to the extent it requires joint through rates and the order in said proceeding insofar as

it fixes divisions of such joint rates were entered simultaneously. The order fixing divisions was entered without any finding in the report that any existing divisions have been, are, or will be unlawful or that the existing apportionment of through charges has been, is, or will be unlawful in any respect.

IX

The Commission's aforesaid order requiring a cessation of the present basis of apportioning through revenues under said proportional rates and its report and order prescribing joint through rates and divisions for the future, are based upon an insufficiency of competent evidence of record to support such a result and are in fact arbitrary, directly contrary to the evidence, and result in an apportionment of revenues unduly favorable to the Montana Western and clearly unfair to the Great Northern.

X

Said report and order require the Great Northern to forego its present charges on grain from Conrad under rates not found in any respect unlawful and to become a joint participant with an insolvent railroad in a transportation service to which the Great Northern is not now committed except under its separately established charge from Conrad solely so that under joint rates and the new allocation of charges ordered the insolvent can be relieved of its financial difficulties at Great Northern's expense, without, however, the allowance of compensation to the Great Northern for giving up its present reasonable charges from Conrad.

XI

If said order is permitted to become operative April 1, 1951, as now provided, it will cause Great Northern irrepar-

able injury and damage of the nature hereinafter set forth.

1. If Great Northern complies with said order by establishing and publishing the joint through rates as prescribed by the Commission and establishing the divisions set forth in said order Great Northern will suffer an annual loss in the amount of $35,000 or more from the revenues it now receives under its existing lawful proportional rates on grain from points on Montana Western to points on Great Northern.

2. If Great Northern refuses to comply with said order of the Commission such refusal will constitute a violation of the provisions of Paragraph 8 of Section 16 of the Interstate Commerce Act and such refusal may subject Great Northern to statutory penalties of $5,000 for each such violation, each day of such refusal being deemed a separate offense, and such conduct will expose Great Northern to an action by the United States of America for the recovery of such penalties [49 U.S.C. Section 16, par. (8)].

Conclusions of Law

Upon the foregoing facts the Court makes the following conclusions of law:

I

The Court has jurisdiction of the cause and of the parties thereto.

II

Great Northern has no plain, adequate or complete remedy at law in the premises.

III

The relief prayed for in the petition should be granted and a judgment and decree entered setting aside, annulling and perpetually enjoining the enforcement of said order of

the Commission insofor as it relates to the issues in said Docket 30325.

ORDER FOR JUDGMENT AND DECREE

Let the judgment and decree of this Court be entered accordingly.

JOHN B. SANBORN,
United States Circuit Judge.
M. M. JOYCE,
DENNIS F. DONOVAN,
United States District Judges.

Dated March 27, 1951.

APPENDIX B

APPLICABLE PROVISIONS OF INTERSTATE COMMERCE ACT

Sec. 15. (As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, August 9, 1935, and September 18, 1940.) (U.S. Code, title 49, sec. 15.)

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the

Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(2) * * * * * *

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers

proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

(5) * * * * * *

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or

prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

Appendix C

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GREAT NORTHERN RAILWAY

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GREAT NORTHERN RAILWAY SYSTEM

GREAT NORTHERN SUBSIDIARY LINES IN CANADA

BURLINGTON LINES

SPOKANE, PORTLAND & SEATTLE RAILWAY
(AND ITS SUBSIDIARY LINES)

Other Railroads

Steamship Lines

Standard Time Division

Statute Miles

Kilometers

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McNALL-WARNER CO., ST. PAUL, MINN., U. S. A.